

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-08-90029

BEFORE
Lynch, Chief Circuit Judge

ORDER
ENTERED: OCTOBER 28, 2008

On August 11, 2008, complainant, a pro se litigant, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. The complainant alleges that the judge has engaged in misconduct in connection with three of the five civil cases that the complainant has filed in the district-- two civil rights cases filed in 2006 and 2007, respectively, and a habeas petition also filed in 2007.

This complaint is the third filed by the complainant against the same judge. The complainant filed Complaint No. 469, on July 18, 2007, which then Chief Judge Boudin dismissed by order, dated September 19, 2007. The complainant subsequently filed Complaint No. 478, on December 11, 2007, which the chief judge dismissed on February 20, 2008. Complaint No. 469 concerned two of the three cases at issue in the present matter and Complaint No. 478 addressed the third case presently at issue, as well as another of the complainant's proceedings. Each of these complaints was dismissed for failure to provide any support for the charges that the judge exhibited both bias and a disability in presiding over the complainant's cases. See Boudin, C.C.J., Order, In re: Complaint

No. 469, September 19, 2007, and Boudin, C.C.J., Order, In re: Complaint No. 478, February 20, 2008. While the complainant did not file a petition for review in connection with his first complaint, he did so in Complaint No. 478. The Judicial Council affirmed the chief judge's order of dismissal on August 13, 2008. See Judicial Council of the First Circuit, Order, In re: Complaint No. 478, August 13, 2008.

The complainant presently alleges generally that, in presiding over the three cited cases¹, the judge has exhibited racial and religious bias in violation of the complainant's civil rights. The complainant states that he is a member of a religion that the judge "refuses to accept" and that the judge has exhibited bias in his handling of the issues raised in the complainant's cases concerning the complainant's religion, prison conditions, and race. There is no support in the record for these contentions of bias.

The complainant also presents several more specific allegations. The complainant alleges that the judge is "purposefully delaying and refusing to render a decision" on a written objection that the complainant filed in March of 2008 to a recommended ruling issued by a magistrate judge in the habeas proceeding. The complainant states that he initially failed to receive the magistrate judge's report and recommendation which the court first adopted in January, 2008. The complainant explains that, when he raised the issue of notice, the court rescinded the order and allowed the complainant to file an objection. The complainant infers that, due to his initial decision accepting

¹Since the filing of the present complaint, the complainant has filed a fourth complaint, No. 01-08-90035, on September 22, 2008. Unlike the complainant's first three complaints, this complaint is filed against another judge and alleges a procedural issue concerning the sufficiency of the forms supplied to prisoners who seek to file civil rights cases in the district. This same issue is raised and will be addressed in connection with the disposition of Complaint No. 01-08-90035.

the magistrate judge's recommendation and "his blatant prejudices towards [the complainant]," the judge is purposefully delaying issuing a ruling on this matter.

The complainant next asserts that the judge has engaged in improper ex parte communication with opposing counsel in the 2007 civil rights case, provided "legal advice" to counsel, and "arrange[d] orders for [counsel] to follow." Specifically, the complainant states that counsel for the defendants, "followed the judge's . . . memo [sic] and order . . . to fashion his . . . motion . . . to dismiss" and that the complainant's motion to amend the judge's order, filed several months later, was wrongfully ignored. The complainant concludes that, "upon information and belief," the judge continues to engage in prohibited ex parte communications with opposing counsel and that "[d]inner dates with them were reported."

The complainant also contends that the judge has engaged in improper ex parte communication with prison officials, defendants in his civil rights cases, and has explicitly directed the prison librarian to withhold from the complainant legal research and writing materials at "crucial times" during his litigation. As purported evidence, the complainant cites multiple motions for extensions of time that he filed in the 2007 civil rights case. The complainant further submits that the judge has directed that the complainant be maintained in protective custody, although the judge knows that the complainant's life has been "threatened by inmates and staff therein," and concludes that the court has failed to address the violations of his civil rights occurring in prison that have been the subject of his proceedings.

Lastly, the complainant asserts that the judge wrongfully forced the complainant to pay a "double filing fee" by mandating that he refile the allegations raised in an earlier case as a separate matter (in the 2007 civil rights proceeding). The complainant requests corrective action requiring

the judge to issue a ruling immediately on the pending matter in the habeas case, reassign the complainant's cases to another judge, or at least, order the judge to desist from engaging in ex parte communication and making biased decisions against the complainant.

The record--consisting of the misconduct complaint, the dockets of the three cited cases, and the relevant pleadings and court orders--fail to support the complainant's charges. With regard to the first of the three referenced cases, the 2006 civil rights case, the complainant offers no specific allegations of judicial wrongdoing beyond the general charges of racial and ethnic bias. In a lengthy order, the judge reviewed the complainant's charges, ordered the issuance of summonses and service (at government expense) on the majority of the defendants and required the complainant to show cause why his claims against four of the remaining defendants should not be dismissed.

The complainant subsequently submitted a response to the court's order, after which the court ordered the issuance of summonses and service on the remaining defendants. Service was executed during the following months and the defendants filed a motion for a more definite statement. Meanwhile, the complainant had filed a motion for recusal which the court summarily denied. The complainant filed a more definite statement and the defendants filed their respective answers. Earlier this year, the judge referred the case to a magistrate judge who recently set a scheduling conference.

After the complainant filed his subsequent case, the 2007 petition for habeas corpus, the court promptly allowed the complainant's motion to proceed in forma pauperis (IFP) and ordered service. The respondent subsequently filed a motion to dismiss, and the judge referred the case to the same magistrate judge to whom the other matter was referred. The complainant then filed the same motion for recusal as he filed in the other pending case which the judge denied in this matter, as well. In late 2007, the magistrate judge issued the report and recommendation referenced by the

complainant suggesting that the case be dismissed for failure to exhaust state remedies. The judge adopted this recommended ruling and ordered the case closed.

Thereafter, the complainant filed a number of motions and a notice of appeal stating, in part, that he had not received the magistrate judge's report and recommendation. The judge referred these pending matters to the magistrate judge who allowed the complainant's motion to rescind based upon the complainant's contention that he had not received the earlier recommended ruling. The complainant filed an objection to the magistrate judge's recommended ruling in April, 2008, which, as alleged, remains pending with the court.

The complainant filed the third case at issue, a civil rights case against prison officials and staff, later in 2007. In this matter, the judge promptly issued an order explaining that, as the present case reflected the complainant's attempt to cure the deficiencies of one of his previously dismissed actions, he would allow the complainant's IFP motion and order service be completed. The complainant then filed a motion to amend, the defendants filed a motion for an extension of time, and the complainant filed a motion to compel discovery.

In another order, the judge denied these motions. As to the motion to amend, the judge explained that he had not ruled on the merits of the complainant's claims in this matter but, as the case reflected the complainant's refiling of previously dismissed action, the assessment of a filing fee and a prohibition against further amendments by the complainant were appropriate. In regard to the other motions, the court set a deadline for the filing of dispositive motions and explained that the complainant's motion for discovery was premature. Thereafter, the judge referred the case to the same magistrate judge who is handling the complainant's other cases. After the filing of several motions in which the complainant sought additional time, the complainant filed an opposition to

the motion to dismiss, and the matter remains pending before the court. The judge's numerous lengthy orders in each of the complainant's proceedings reflect an impartial analysis of the issues before the court and no misconduct.

Nor do any of the reviewed materials provide any information suggesting that the judge wrongfully directed that the complainant be maintained in protective custody or deprived of writing materials. The magistrate judge's rulings on the complainant's motions for additional time, filed in the 2007 civil rights proceeding, do not, as alleged, support the complainant's conclusions in this regard.

Nor is there any evidence to support the complainant's charges of ex parte communication between the judge and defense counsel or between the judge and any prison personnel. The court's order--to which the complainant objects--merely sets forth the origins of the case (explaining that it presents the same claims as were dismissed without prejudice in the complainant's earlier matter), allows the complainant's IFP motion and prohibits the complainant from amending his complaint absent court order. This order contains no "legal advise," as alleged, or provide any indication of improper communication between the judge and counsel. Accordingly, the allegations of bias and ex parte communication are dismissed as frivolous pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

The complainant's next assertion--that the judge has improperly delayed ruling on the complainant's objection to the magistrate judge's recommended ruling in the habeas matter --is equally unmeritorious. Where, as here, there is no indication of improper judicial motivation or habitual delay in multiple unrelated cases, delay in rendering a decision in a single case does not suggest cognizable misconduct. See Rules of Judicial Misconduct, Rule 3(h)(3)(B). Nor did the

court "ignore" the motion to amend filed in the 2007 civil rights case. As indicated, the judge ruled on this motion several months after it was filed.

Insofar as the complainant disputes the substance of the courts' orders--including the order requiring the complainant to pay the filing fee in the filing of his 2007 civil rights case, and the orders denying the complainant's motions for recusal--the complaint is directly related to the merits and, as such, is not cognizable in a misconduct proceeding. See Rules of Judicial Misconduct, Rule 3(h)(3)(A). Accordingly, the complaint is also dismissed pursuant to 28 U.S. §§ 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

For the reasons stated, Judicial Misconduct Complaint No. 01-08-90029 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii).

10/28/08
Date

Sandra L. Lynch
Chief Judge Lynch